MOTION FILED
DEC 6 1984

No. 84-716

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ARKANSAS LOUISIANA GAS COMPANY,
A DIVISION OF ARKLA, INC.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

MOTION OF INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

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Interstate Natural Gas Association of America

ACTIVE MEMBER COMPANIES:

Alabama-Tennessee Natural Gas Company
Algonquin Gas Transmission Company
ANR Pipeline Company
Black Marlin Pipeline Company
Colorado Interstate Gas Company
The Columbia Gas System, Inc.
Consolidated Natural Gas Company
Continental Resources Company
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Granite State Gas Transmission Inc.
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Michigan Gas Storage Company
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Mid Louisiana Gas Company
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Interstate Natural Gas Association of America

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National Fuel Gas Company
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Shell Oil Company
Southern California Gas Company
Southern Union Company
Sun Exploration & Production Company
Texaco U.S.A.
Union Oil Co. of California

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MOTION OF INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The Interstate Natural Gas Association of America (INGAA)* moves for leave to file the accompanying brief amicus curiae. This motion is necessary because counsel for one party to this proceeding, the Cities of Winfield, Kansas and Mangum, Oklahoma refused

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* INGAA's member companies are listed on the inside cover and the cover's facing page of this motion and brief.

to consent to the filing of such brief. All other parties have consented, as evidenced by the letters of consent filed with the Clerk in this docket.

INTEREST OF AMICUS CURIAE

INGAA is a nonprofit national trade association representing virtually all of the major interstate natural gas transmission companies in the United States. These companies are subject to the regulatory jurisdiction of the Federal Energy Regulatory Commission (Commission or FERC) under the Natural Gas Act (15 U.S.C. § 717, *et seq.*), the Department of Energy Organization Act (42 U.S.C. § 7101, *et seq.*) and the Natural Gas Policy Act (15 U.S.C. § 3301, *et seq.*).

The rates of all of these companies are set by the Federal Energy Regulatory Commission pursuant to Sections 4 and 5 of the Natural Gas Act (15 U.S.C. §§ 717c and 717d). Purchase gas adjustment (PGA) filings are made by most on either an annual or a semiannual basis. The opinion of the United States Court of Appeals for the District of Columbia Circuit in this case would adversely affect the entire interstate natural gas pipeline industry by unlawfully imposing a retroactive reduction below a pipeline's previously established just and reasonable rate. This opinion is in conflict with the opinion of this Court in *FPC* v. *Sunray DX,* 391 U.S. 9 (1968) and the United States Court of Appeals in *Distrigas of Massachusetts Corp.* v. *FERC,* 737 F.2d 1208 (1st Cir. 1984).

The interests of the interstate natural gas transmission industry in this proceeding are relevant to

the disposition of the petition for a writ of *certiorari* by this Court and cannot adequately be represented by any party other than INGAA.

WHEREFORE, INGAA respectfully requests this Court to grant it leave to file a Brief Amicus Curiae in support of Petitioner.

Respectfully submitted,

JOHN H. CHEATHAM, III

December 6, 1984

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BRIEF AMICUS CURIAE OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

This amicus curiae brief is respectfully submitted by the Interstate Natural Gas Association of America (INGAA) in support of the Petition for Writ of Certiorari of the Arkansas Louisiana Gas Company (ARKLA).

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the District of Columbia Circuit is unreported. Styled as *Arkansas Louisiana Gas Co.* v.

FERC, that Opinion was issued and judgment rendered on June 14, 1984, and rehearing was denied on August 9, 1984 in Case No. 83-1548. The orders of the Federal Energy Regulatory Commission (FERC) are reported at 22 FERC ¶ 61,125 (1983); rehearing denied 23 FERC ¶ 61,030.

JURISDICTION

INGAA incorporates by reference the jurisdictional statement set forth in ARKLA's Petition for a Writ of Certiorari at 3.

INTEREST OF AMICUS CURIAE

INGAA is a nonprofit national trade association representing virtually all of the major interstate natural gas transmission companies in the United States. These companies are subject to the regulatory jurisdiction of the Federal Energy Regulatory Commission (Commission or FERC) under the Natural Gas Act (15 U.S.C. § 717, et seq.), the Department of Energy Organization Act (42 U.S.C. § 7101, et seq.) and the Natural Gas Policy Act (15 U.S.C. § 3301, et seq.).

The rates of all of these companies are set by the Federal Energy Regulatory Commission pursuant to Sections 4 and 5 of the Natural Gas Act (15 U.S.C. § 717c and 717d. Purchase gas adjustment (PGA) filings are made by most on either an annual or a semiannual basis. The opinion of the United States Court of Appeals for the District of Columbia Circuit in this case would adversely affect the entire interstate natural gas pipeline industry by unlawfully imposing a retroactive reduction below a pipeline's

previously established just and reasonable rate. This opinion is in conflict with the opinion of this Court in *FPC* v. *Sunray DX,* 391 U.S. 9 (1968) and the United States Court of Appeals in *Distrigas of Massachusetts Corp.* v. *FERC,* 737 F.2d 1208 (1st Cir. 1984).

SUMMARY OF ARGUMENT

The Petition For Writ of Certiorari filed by ARKLA should be granted, and the *per curiam* memorandum opinion of the United States Court of Appeals for the District of Columbia Circuit herein should be reversed, because:

1. Such Opinion is in conflict with a decision of the Supreme Court of the United States.

2. Such Opinion is in conflict with decisions of another federal court of appeals on the same issue.

3. Such Opinion presents the issue of whether the Commission, in implementing its regulations pertaining to purchase gas adjustment clauses (PGA) under the Natural Gas Act, can do what is forbidden by statute, *i.e.,* order a retroactive reduction below a pipeline's previously established just and reasonable rate.

BACKGROUND AND ARGUMENT

The facts are simple. A natural gas pipeline company—Arkansas Louisiana Gas Company (ARKLA) —had rates in effect in 1980 and filed a routine application with the FERC pursuant to Section 4 of the Natural Gas Act to increase them. The rate in effect was approximately $1.69 per thousand cubic feet of gas

(Mcf), and it was a lawful rate, having been previously approved by the FERC. The proposed increased rate was approximately $1.78 per Mcf. The FERC routinely suspended such rate, pending investigation, and it thus became effective, subject to possible refund, on November 1, 1980. On February 4, 1983, after hearings, the FERC ordered that the proper rate was 156.09 cents or approximately $1.56 per Mcf—lower than both the previously effective rate and, of course, the proposed increased rate. *Arkansas Louisiana Gas Company, A Division of Arkla, Inc.*, 22 FERC ¶ 61,125, *rehearing denied* 23 FERC ¶ 61,030 (1983).

If the FERC had determined that the previously approved rate of $1.69 per Mcf (and the proposed new rate) were unjust and unreasonable, it could have set a lower just and reasonable rate and made it effective *from the date of such order*—February 4, 1983. Here, however, the FERC reduced the new rate below the previously approved rate *and made that reduction effective as of November 1, 1980.* This was clear error because it constitutes retroactive ratemaking prohibited by the Natural Gas Act.

Under Section 4(e) of the Natural Gas Act (15 U.S.C. § 717(c)), when a natural gas company files an increased rate, the FERC can suspend the proposed rate for a period of five months. If the FERC's hearing to determine the justness and reasonableness of the rate has not concluded within that five month period, the rate can be collected subject to refund as of the date it goes into effect.[1] But as to the period

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[1] See, *Hope Natural Gas Company* v. *Federal Power Commission*, 196 F.2d 803 (4th Cir. 1952).

from the date such proposed increased rate is put into effect subject to refund (here, the rate of $1.78, put into effect on November 1, 1980) until the new rate is ordered (here, the rate of $1.56, ordered February 4, 1983), the amount which can be ordered refunded is limited to the difference between the rate sought ($1.78) and the rate previously in effect ($1.69). This stems from the provisions of Section 4(e) of the Natural Gas Act, which allow the FERC "to order such natural gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified."

In *FPC* v. *Sunray DX Oil Co.*, 391 U.S. 9 (1968), this Court, dealing with a natural gas company which was a producer of gas, construed Section 4(e) of the Natural Gas Act and held that the potential *refund* obligation is limited to "the amounts received by reason of such increase." This Court said that:

> It is true that § 4(e) in terms gives the Commission power to refund 'the portion of such increased rates or charges' found to be excessive, and does not expressly limit the refund to the rate increase or increment. *However, the accounting provision, which appears earlier in the same sentence, requires that the producer account only for the 'amounts received by reason of such increase.' If it had been intended that the refund obligation should extend to greater amounts the accounting requirement logically should have extended to them also.* Viewing the Act more broadly, there is another reason by this interpretation of § 4(e) is preferable. It seems incontestable that if a producer consistently sells gas at the price specified in a final, permanent certificate, and does not attempt to increase its price, the Commission may not order it to make refunds

> simply because the just and reasonable rate for its area turns out to be below the in-line price. This would amount to a reparation order, and this Court has repeatedly held that the Commission has no reparation power. *It would be anomalous to treat an increased price as a trigger for a refund obligation which would leave the producer with a smaller net return than if it had never increased its price at all.* We therefore consider and hold that an initial price which is authorized in a final, unconditioned permanent certificate is a lower limit below which a refund cannot be ordered under § 4(e). (emphasis added) (footnote omitted) (*Id.* at 24)

Immediately prior to the above quotation from *Sunray DX,* this Court said at 391 U.S. 23:

> It has *sometimes been contended* that when a producer operating under a nonreviewable permanent certificate increases its price under § 4, the permanently certificated price is not a lower limit on the refund power, and that if the eventual just and reasonable area rate is below the permanently certified price, the Commission may order a *refund not merely of the price increase but of the entire difference between the increased rate and the just and reasonable rate. The Commission has never passed on this contention, and this Court has twice rejected it in dictum.* In Sunray Mid-Continental Oil Co. v. FPC, 364 U.S. 137, 146, 4 L Ed 2d 1623, 1630, 80 S Ct 1392, the Court interpreted § 4(e) as meaning that 'the Commission is empowered to require the company to collect the increment under bond and accounting, and refund it if it could not make out its case for the increase.' In *Callery,* supra, the Court stated that '[t]he fixing of an initial 'in-line' price establishes a firm price at which a producer may operate, pending determination of a just and

> reasonable rate, without any contingent obligation to make refunds should a just and reasonable rate turn out to be lower than the 'in-line' price.' 382 U.S. at 227, 15 L Ed 2d at 288. (emphasis added) (footnote omitted)

The Court went on to state that ". . . *We adhere to the dicta in Callery and Sunray Mid-Continent.* That outcome comports better with the language of § 4(e) than does the alternative." (emphasis added) (391 U.S. 23)

It is thus clear that while the FERC could order ARKLA to refund the difference between $1.78 and $1.69, it exceeded its statutory power in ordering a refund down to $1.56, which is below the previously approved rate. In the instant proceeding, part of the effective underlying rate of $1.69 was the result of PGA increases obtained pursuant to Section 4 of the Natural Gas Act. Rate increases pursuant to Section 4 must be just and reasonable.[2] PGA increases are related to one cost factor—the price of gas. Since ARKLA's PGA increases were approved by the Commission, they have been found to be just and reasonable. However, the Commission's ruling hereinbelow has sought to ignore that fact, treat such increases as conditional, and, thereby retroactively reduce the

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[2] Section 4(a) of the Natural Gas Act provides specifically:

> All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, *shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.* (emphasis added)

previously approved rates. There is no statutory foundation for this.

In *Distrigas of Massachusetts Corp., et al.* v. *FERC*, 737 F.2d 1208 (1984), the Court of Appeals for the First Circuit cites and relies on this Court's above quoted decision in *Sunray DX*, whereas the District of Columbia Circuit in its memorandum decision herein, issued the same date, cites *no* cases in its two paragraph discussion of the issue. The First Circuit said:

> The Commission's power to order refunds comes from section 4(e) of the Natural Gas Act, 15 U.S.C. § 717c(e) . . . . That section deals with rate *increases* that a regulated firm proposes. It provides that, after five months, these increases shall take effect on the firm's motion. While Commission review proceedings continue, the Commission can require the firm to 'keep accurate accounts in detail of all amounts received by reason of such increase . . . .' Upon completion of the review proceedings, the Commission may order the firm 'to refund, with interest, the portion of such increased rates or charges by its decision found not justified.' The Supreme Court has specifically stated that the pre-existing lawful rate provides a refund floor in a section 4 proceeding. *Federal Power Commission* v. *Sunray DX Oil Co.*, 391 U.S. 9, 22-25 88 S Ct 1526, 1533-1535, 20 L Ed 2d 388 (1968). It derived this conclusion from the language of the statute and from the fact that, otherwise, a firm asking for an increase could end up considerably worse off than if it had not requested one. And, ironically, the firms least likely to be earning monopoly profits would be the firms most exposed to past rate scrutiny (for they are the firms most likely to see a need to ask for a rate increase).

> We find Boston Gas's efforts to distinguish *Sunray* unconvincing. The Supreme Court's language clearly interprets section 4's refund authority as limited to the 'amounts received by reason of such *increase.*' 15 U.S.C. § 717c(e) (emphasis added). We also find the logic of *Sunray* convincing and note that it is broadly consistent with the traditional language of similar statutes in the ratemaking area. *Cf. Commonwealth of Massachusetts, Department of Public Utilities* v. *United States,* 729 F.2d 886 (1st Cir. 1984) (listing similarly structured statutes). But, of course, we would be bound by *Sunray* even were this not so. (737 F.2d 1224).

Thus, the First Circuit not only recognizes it is bound by this Court's decision in *Sunray DX,* but also expressly agrees with the logic of, and precedential support for that decision. In contrast, the D.C. Circuit's decision hereinbelow, ignores this Court's decision in *Sunray DX* and is in conflict with the First Circuit's decision in *Distrigas.*

Accordingly, it is respectfully submitted that certiorari should be granted and the D.C. Circuit's decision below, reversed. That decision, and the underlying FERC decision, attempt to avoid the force of the above quoted interpretation of the Natural Gas Act by contending that ARKLA's $1.69 filed rate, which was superseded by the proposed increase (to $1.78), is not the refund floor because it was approved in a "PGA" proceeding by the FERC, rather than an all costs proceeding. But that ignores the fact that in both such types of rate proceedings, the FERC approves rates as being just and reasonable under the Natural Gas Act, and thus suitable for use and no longer subject to refund. That approval

for ARKLA established the $1.69 rate as the rate which was being increased, and thus the *floor* for refunds under Section 4 of the Natural Gas Act, as interpreted by this Court in *Sunray DX* and the First Circuit in *Distrigas*.

The attempt by the FERC to change that statutorily mandated result by reliance on its own internal practices and regulations is invalid and merits summary reversal. At the least, it merits full examination upon brief and argument. Every natural gas pipeline company periodically (every year or two) files for rate changes and the question of the extent of their maximum refund exposure is raised. This is the first time the FERC has attempted to impose a refund obligation below the level of the superseded rate. That practice should be reversed now, as inconsistent with the Natural Gas Act and the holdings of this Court and the First Circuit. Such action will allow orderly administration of the Natural Gas Act and will preclude multiple appeals to the various United States Court of Appeals of the same question by other pipeline companies and *amicus curiae*. Such appeals will result inevitably when the holding below is applied to them, if it is not reversed here.

CONCLUSION

It is respectfully requested that this Court grant the Petition For Writ of Certiorari by ARKLA and reverse the erroneous decision of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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December 6, 1984